

UNITED STATES OF AMERICA  
UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

---

THOMAS A. SIMON, # 257686,	)	
	)	
Plaintiff,	)	Case No. 1:12-cv-1184
	)	
v.	)	Honorable Robert Holmes Bell
	)	
PATRICK TRIERWEILER, et al.,	)	<b><u>REPORT AND RECOMMENDATION</u></b>
	)	
Defendants.	)	
	)	

---

This is a civil rights action brought *pro se* by a state prisoner under 42 U.S.C. § 1983. Plaintiff's complaint arises from conditions of his confinement at the Bellamy Creek Correctional Facility (IBC) in August 2012. The defendants are Assistant Deputy Warden (ADW) Patrick Trierweiler, Corrections Officer Lucas Robertson, and Corrections Officer Harold Warr. Plaintiff alleges that he has been diagnosed as bi-polar and schizophrenic. (Compl. at 10). He states that for the month at issue, he did not believe it was safe to eat the food that he was served at IBC because Officer Robertson spat in his food. (*Id.* at 9). He accuses Officer Warr of "threatening and harassing" him without further elaboration. (*Id.*). He alleges that ADW Trierweiler "came to the plaintiff's door and addressed the issue, but never really investigated or disciplined the[] officers." (*Id.* at 10). Plaintiff alleges that defendants' actions violated his Eighth Amendment rights.<sup>1</sup> He sues defendants in their official capacities and seeks damages and injunctive relief. (*Id.* at 8, 13).

---

<sup>1</sup>All other claims were dismissed on January 15, 2013. (docket #s 10, 11).

The matter is before the court on defendants' motions for summary judgment based on the affirmative defense provided by 42 U.S.C. § 1997e(a). (docket #s 15, 26). Plaintiff filed a response to the motion for summary judgment by defendants Trierweiler and Robertson (docket # 22), but he elected not to file a response to defendant Warr's motion for summary judgment.<sup>2</sup> I recommend that all plaintiff's claims for damages against defendants in their official capacities be dismissed with prejudice because they are barred by Eleventh Amendment immunity. I recommend that plaintiff's claims against defendants Trierweiler and Warr be dismissed for failure to state a claim on which relief can be granted.<sup>3</sup> I further recommend that defendants' motions for summary judgment be granted and that all plaintiff's claims for injunctive relief against defendants be dismissed.

### **Summary Judgment Standard**

#### **A. Summary Judgment Standard**

Summary judgment is appropriate when the record reveals that there are no genuine issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Griffin v. Hardrick*, 604 F.3d 949, 953 (6th Cir. 2010). The standard for

---

<sup>2</sup>Although plaintiff elected not to file a response to defendant Warr's motion for summary judgment, the court may not for that reason alone enter judgment against plaintiff. *See Carver v. Bunch*, 946 F.2d 451, 454-55 (6th Cir. 1991); *accord Cacevic v. City of Hazel Park*, 226 F.3d 483, 486 (6th Cir. 2000). Rather, the court is required to examine defendants' motions to ensure that each defendant has discharged his burden of showing entitlement to judgment as a matter of law.

<sup>3</sup>The recommendations for dismissal for failure to state a claim and for seeking monetary relief against immune defendants are made under statutory authority. *See* 28 U.S.C. §§ 1915A(b), 1915(e)(2)(B).

determining whether summary judgment is appropriate is “whether ‘the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Moses v. Providence Hosp. Med. Centers, Inc.*, 561 F.3d 573, 578 (6th Cir. 2009) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). The court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences in favor of the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 676 (6th Cir. 2011).

When the party without the burden of proof seeks summary judgment, that party bears the initial burden of pointing out to the district court an absence of evidence to support the nonmoving party’s case, but need not support its motion with affidavits or other materials “negating” the opponent’s claim. *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 787 (6th Cir. 2000); *see also Minadeo v. ICI Paints*, 398 F.3d 751, 761 (6th Cir. 2005). Once the movant shows that “there is an absence of evidence to support the nonmoving party’s case,” the nonmoving party has the burden of coming forward with evidence raising a triable issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To sustain this burden, the nonmoving party may not rest on the mere allegations of his pleadings. FED. R. CIV. P. 56(e); *see Everson v. Leis*, 556 F.3d 484, 496 (6th Cir. 2009). The motion for summary judgment forces the nonmoving party to present evidence sufficient to create a genuine issue of fact for trial. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1990); *see Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 533 (6th Cir. 2012). “A mere scintilla of evidence is insufficient; ‘there must be evidence on which a jury could reasonably find for the [non-movant].’” *Dominguez v. Correctional Med. Servs.*, 555 F.3d 543, 549

(6th Cir. 2009) (quoting *Anderson*, 477 U.S. at 252); *see LaQuinta Corp. v. Heartland Properties LLC*, 603 F.3d 327, 335 (6th Cir. 2010).

A moving party with the burden of proof faces a “substantially higher hurdle.” *Arnett v. Myers*, 281 F.3d 552, 561 (6th Cir. 2002); *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1056 (6th Cir. 2001). The moving party without the burden of proof needs only show that the opponent cannot sustain his burden at trial. “But where the moving party has the burden -- the plaintiff on a claim for relief or the defendant on an affirmative defense -- his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party.” *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) (quoting W. SCHWARZER, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487-88 (1984)). The Court of Appeals has repeatedly emphasized that the party with the burden of proof faces “a substantially higher hurdle” and “must show that the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it.”” *Arnett*, 281 F.3d at 561 (quoting 11 JAMES WILLIAM MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 56.13[1], at 56-138 (3d ed. 2000)); *see Surles v. Andison*, 678 F.3d 452, 455-56 (6th Cir. 2012); *Cockrel*, 270 F.2d at 1056. Accordingly, a summary judgment in favor of the party with the burden of persuasion “is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact.” *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999). Because failure to exhaust remedies is an affirmative defense, this higher standard applies to defendants’ motions.

## **B. Standards Applicable to the Affirmative Defense of Failure to Exhaust Remedies**

Defendants have asserted the affirmative defense of plaintiffs' failure to exhaust administrative remedies. A prisoner bringing an action with respect to prison conditions under 42 U.S.C. § 1983 must exhaust available administrative remedies. 42 U.S.C. § 1997e(a); *see Jones v. Bock*, 549 U.S. 199, 220 (2007); *Porter v. Nussle*, 534 U.S. 516, 532 (2002); *Booth v. Churner*, 532 U.S. 731 (2001). A prisoner must exhaust available administrative remedies, even if the prisoner may not be able to obtain the specific type of relief he seeks in the state administrative process. *See Porter*, 534 U.S. at 520; *Booth*, 532 U.S. at 734. "This requirement is a strong one. To further the purposes behind the PLRA, exhaustion is required even if the prisoner subjectively believes the remedy is not available, even when the state cannot grant the particular relief requested, and even where the prisoner[ ] believes the procedure to be ineffectual or futile." *Napier v. Laurel County, Ky.*, 636 F.3d 218, 222 (6th Cir. 2011) (internal quotations and citations omitted).

In *Jones v. Bock*, the Supreme Court held that "exhaustion is an affirmative defense, and prisoners are not required to specifically plead or demonstrate exhaustion in their complaints." 549 U.S. at 216. The burden is on defendants to show that plaintiffs failed to properly exhaust their administrative remedies. The Supreme Court reiterated that "no unexhausted claim may be considered." 549 U.S. at 220. The Court held that when a prisoner complaint contains both exhausted and unexhausted claims, the lower courts should not dismiss the entire "mixed" complaint, but are required to dismiss the unexhausted claims and proceed to address only the exhausted claims. 549 U.S. at 219-24.

In order to exhaust administrative remedies, prisoners must complete the administrative review process in accordance with the deadlines and other applicable procedural rules

established by state law. *Jones v. Bock*, 549 U.S. at 218-19. In *Woodford v. Ngo*, 548 U.S. 81 (2006), the Supreme Court held that the PLRA exhaustion requirement “requires proper exhaustion.” 548 U.S. at 93. “Proper exhaustion demands compliance with an agency’s deadlines and other critical procedural rules.” *Id.* at 90; *see Scott v. Ambani*, 577 F.3d 642, 647 (6th Cir. 2009). Thus, when a prisoner’s grievance is rejected by the prison as untimely because it was not filed within the prescribed period, the prisoner’s claim is not “properly exhausted” for purposes of filing a section 1983 action in federal court. 548 U.S. at 90-93; *Siggers v. Campbell*, 652 F.3d 681, 692 (6th Cir. 2011); *see* 42 U.S.C. § 1997e(a). The procedural bar does not apply where the State declines to enforce its own procedural rules. *See Reed-Bey v. Pramstaller*, 603 F.3d 322, 324-25 (6th Cir. 2010).

MDOC Policy Directive 03.02.130 (effective July 9, 2007) sets forth the applicable grievance procedures.<sup>4</sup> In *Sullivan v. Kasajaru*, 316 F. App’x 469, 470 (6th Cir. 2009), the Sixth Circuit held that this policy directive “explicitly required [the prisoner] to name each person against whom he grieved,” and it affirmed the district court’s dismissal of a prisoner’s claim for failure to properly exhaust his available administrative remedies. *Id.* at 470.

Policy Directive 03.02.130 is not limited to the requirement that the individual being grieved be named in the Step I grievance. The following is an overview of the grievance process. Inmates must first attempt to resolve a problem within two business days of becoming aware of the grievable issue, unless prevented by circumstances beyond his control. *Id.* at ¶ P. If the mandatory pre-grievance attempt at resolution is unsuccessful, the inmate may proceed to Step I of the grievance process and submit a completed grievance form within five business days of the attempted

---

<sup>4</sup>A copy of the policy directive is found in the record. *See* docket # 16-2, ID#s 76-82.

resolution. *Id.* The Policy Directive also provides the following directions for completing Step I grievance forms: “The issues should be stated briefly but concisely. Information provided is to be limited to the *facts* involving the issue being grieved (i.e., who, what, when, where, why, how). Dates, times, places, and names of all those involved in the issue being grieved are to be included.” *Id.* at ¶ R (emphasis in original). Thus, where an individual is not named in the Step I grievance, or his or her involvement in the issue being grieved is not indicated, or the individual is mentioned for the first time during an appeal of a denial of a grievance, the claims against that individual are not properly exhausted. *See Ketzner v. Williams*, No. 4:06-cv-73, 2008 WL 4534020, at \* 16 (W.D. Mich. Sept. 30, 2008) (collecting cases); *accord Sullivan v. Kasajaru*, 316 F. App’x at 470.

The inmate submits the grievance to a designated grievance coordinator who makes an initial determination whether it should be rejected under MDOC policy or assigns it to a respondent. P.D. 03.02.130 at ¶¶ W, X. If the inmate is dissatisfied with the Step I response, or does not receive a timely response, he may appeal to Step II by obtaining an appeal form within ten business days of the response, or if no response was received, within ten business days after the response was due. *Id.* at ¶ BB. The respondent at Step II is designated by the policy. The Step II respondent is generally the warden or the warden’s designee. *Id.* at ¶ DD. If the inmate is dissatisfied with the Step II response, or does not receive a timely Step II response, he may appeal to Step III using the same appeal form. *Id.* at ¶ FF. The Step III appeal form must be sent to the Grievance and Appeals Section within ten business days after receiving the Step II response, or if no Step II response was received, within ten business days after the date the Step II response was due. *Id.* at ¶ FF. The Grievance and Appeals Section is the Step III respondent. *Id.* at ¶ GG. Time limitations shall be adhered to by the inmate and staff at all steps of the grievance process. *Id.* at ¶

S. “The total grievance process from the point of filing a Step I grievance to providing a Step III response shall generally be completed within 120 calendar days unless an extension has been approved in writing.” *Id.*

Ordinarily, a prisoner must pursue appeals of his grievance through Step III of the administrative process. The Sixth Circuit has “clearly held that an inmate does not exhaust available administrative remedies when the inmate fails entirely to invoke the grievance procedure.” *Napier*, 636 F.3d at 224. An argument that it would have been futile to file a grievance does not suffice. Assertions of futility do not excuse plaintiff from the exhaustion requirement. *See Napier*, 636 F.3d at 224; *Hartsfield v. Vidor*, 199 F.3d 305, 309 (6th Cir. 1999) (“[A]n inmate cannot simply fail to file a grievance or abandon the process before completion and claim that he has exhausted his remedies or that it is futile for him to do so because his grievance is now time-barred under the regulations.”); *see Booth v. Churner*, 532 U.S. at 741 n.6 (“[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise.”).

### **Proposed Findings of Fact**

Plaintiff is an inmate at the Bellamy Creek Correctional Facility (IBC). He was an inmate at IBC during the month at issue, August 2012. Assistant Deputy Warden (ADW) Patrick Trierweiler, Corrections Officer Lucas Robertson, and Corrections Officer Harold Warr are state employees at IBC. Plaintiff did not file grievances against defendants corresponding to the claims asserted in his complaint or pursue such grievances through Step III of the MDOC’s grievance process before filing this lawsuit. (docket #s 16-3, 16-4).

## **Discussion**

### **A. Claims for Damages**

All plaintiffs' claims for damages against defendants in their official capacities are barred by Eleventh Amendment immunity. The Eleventh Amendment bars suit in federal court against a state and its departments or agencies unless the state has waived its sovereign immunity or unequivocally consented to be sued. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Michigan has not consented to civil rights suits in federal court. *See Johnson v. Dellatifia*, 357 F.3d 539, 545 (6th Cir. 2004). A suit against a state officer in his or her official capacity is simply another way of pleading an action against the state. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989); *VIBO Corp. v. Conway*, 669 F.3d 675, 691 (6th Cir. 2012). Furthermore, States and their departments are not "persons" within the meaning of 42 U.S.C. § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. at 71. Defendants are entitled to dismissal with prejudice of all plaintiffs' claims for monetary damages against them in their official capacities.

### **B. Claims against Defendants Trierweiler and Robertson**

Plaintiff alleges that Officer Warr "threatened and harassed" him without alleging any specific facts regarding Officer Warr's conduct. (Compl. at 9). In similar fashion, plaintiff alleges a bare conclusion that ADW Trierweiler's investigation of his complaints was inadequate. (*Id.* at 10). Plaintiff has not alleged facts sufficient to state a claim on which relief can be granted against either defendant. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680-81 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Allegations that a prison official threatened or harassed an inmate state no claim of a constitutional violation. *See Ivey v. Wilson*, 832 F.2d 950, 955 (6th Cir. 1987). Furthermore, a supervisory official cannot be held liable under section 1983 for mere failure

to investigate. *See Everson v. Leis*, 556 F.3d 484, 495 (6th Cir. 2009); *Grinter v. Knight*, 532 F.3d 567, 575 (6th Cir. 2008); *see also Wingo v. Tenn. Dep’t of Corr.*, 499 F. App’x 453, 455 (6th Cir. 2012).

### **C. Exhaustion**

Defendants raised the affirmative defense that plaintiff did not properly exhaust his administrative remedies against them as required by 42 U.S.C. § 1997e(a). Exhaustion is mandatory. *Woodford*, 548 U.S. at 85. “[N]o unexhausted claim may be considered.” *Jones v. Bock*, 549 U.S. at 220. Defendants are entitled to dismissal of plaintiffs’ claims.

Defendants have established by affidavit that plaintiff did not submit his Step III grievance. (docket # 16-3, ID#s 84-86). Plaintiff argues that he did exhaust his available administrative remedies (Plf. Brief at 1), but he presents no supporting evidence. It is well established that statements appearing in a party’s brief are not evidence. *Duha v. Agrium, Inc.*, 448 F.3d 867, 879 (6th Cir. 2006). The papers that plaintiff attached to his brief (docket # 22, ID#s 112, 114, 116) are hearsay, and cannot be considered in ruling on a motion for summary judgment. *Hoover v. Walsh*, 682 F.3d 481, 491 n. 34 (6th Cir. 2012); *see Petroleum Enhancer, LLC v. Woodland*, 690 F.3d 757, 772 (6th Cir. 2012).

Even assuming that the court could somehow consider the document that plaintiff now argues was a grievance that he attempted to file (docket # 22-2, ID# 112), his purported grievance did not allege any misconduct by defendants Trierweiler and Warr. Further, plaintiff did not file any affidavit or unsworn declaration under 28 U.S.C. § 1746 stating under penalty of perjury that he filed this document with the prison’s grievance coordinator and thus attempted to pursue the purported grievance through Step III of the MDOC’s grievance process. On the present record,

defendants have carried their burden on the affirmative defense provided by 42 U.S.C. § 1997e(a) and are entitled to dismissal of all plaintiff's claims for injunctive relief.

**Recommended Disposition**

For the reasons set forth herein, I recommend that all plaintiff's claims for damages against defendants in their official capacities be dismissed with prejudice because they are barred by Eleventh Amendment immunity. I further recommend that plaintiff's claims against defendants Trierweiler and Warr be dismissed for failure to state a claim on which relief can be granted under the statutory authority provided by 28 U.S.C. §§ 1915A(b) and 1915(e)(2)(B). I further recommend that defendants' motions for summary judgment (docket #s 15, 26) be granted and that all plaintiff's claims for injunctive relief against defendants be dismissed under 42 U.S.C. § 1997e(a).

Dated: February 24, 2014

/s/ Joseph G. Scoville  
United States Magistrate Judge

**NOTICE TO PARTIES**

Any objections to this Report and Recommendation must be filed and served within fourteen days of service of this notice on you. 28 U.S.C. § 636(b)(1)(C); FED. R. CIV. P. 72(b). All objections and responses to objections are governed by W.D. MICH. LCIVR 72.3(b). Failure to file timely and specific objections may constitute a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Keeling v. Warden, Lebanon Corr. Inst.*, 673 F.3d 452, 458 (6th Cir. 2012); *United States v. Branch*, 537 F.3d 582, 587 (6th Cir. 2008). General objections do not suffice. *See McClanahan v. Comm'r of Social Security*, 474 F.3d 830, 837 (6th Cir. 2006); *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 596-97 (6th Cir. 2006).